85-524

No.

FILED
SEP 26 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

ROBERT TUDOR,

Petitioner,

v.

JEFFREY LEE GLAESMAN and
ESTHER MARIE GLAESMAN,

Respondents.

Petition for Writ of Certiorari to the
Supreme Court of the
State of Kansas

Robert Tudor, Pro Se
c/o 1712 N Street, N.W.
Washington, D.C. 20036
(202) 785-4166

Question Presented for Review.

Whether the adoption of an Indian child pursuant to Kansas law without the consent of its Indian father and without a showing that the father is unfit, violates the protective provisions of the Indian Child Welfare Act, 25 U.S.C. §§1901-1963, or the Due Process and Equal Protection clauses of the Fourteenth Amendment to the United States Constitution.

Parties

Respondents were the only parties aside from petitioner in the proceedings below. However 28 U.S.C. §2403(b) may be applicable and in accordance with Supreme Court Rule 28.4(c), the Attorney General of the State of Kansas is being served with this Petition.

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Opinion Below.

The unreported opinion of the District Court of Butler County, Kansas is set out in the Appendix. The summary affirmance of the Kansas Court of Appeals

and the subsequent denial of the petition for review of the Kansas Supreme Court are also set out in the Appendix.

Jurisdiction.

The petition for review was denied by the Supreme Court of the State of Kansas on June 28, 1985. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3).

Constitutional Provisions and Statutes Involved.

United States Constitution, Amendment XIV, §1

> ...nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Code, Title 25

§1912. Pending court proceedings

(f) Parental rights termination orders; evidence; determination of damage to child

No termination of parental rights may be ordered in such proceeding [involuntary proceeding in State court] in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

* * *

§1913. Parental rights, voluntary termination

* * *

(c) Voluntary termination of parental rights or adoptive placement; withdrawal of consent; return of custody

In any voluntary proceeding for termination of parental rights to, or adoptive placement of, an Indian child, the consent of the parent may be withdrawn for any reason at any time prior to the entry of a final decree of termination or adoption, as the case may be, and the child shall be returned to the parent.

* * *

Kansas Statutes Annotated,

§59-2102. Written consent required

. . .

(a) Before any minor child is adopted, consent must be given to such adoption by:

(1) The living parents of a legitimate child;

(2) the mother of an illegitimate child;

(3) the father of an illegitimate child, if the father's consent is required by the court pursuant to K.S.A. 59-2105;

* * *

§59-2105. Adoption of illegitimate child without father's consent

(a) When a petition for adoption of an illegitimate child is filed and the consent of the father of the child is not given, the court shall determine, in the adoption proceeding, whether the father's consent is required.

(b) If the court is satisfied that all reasonable efforts at giving notice of the hearing to the putative father have been attempted, the court shall proceed with the hearing

on whether the father's consent to the adoption is required.

(c) At the hearing, the court shall first resolve any dispute regarding paternity. At the conclusion of the hearing, the court may determine that the father's consent to the adoption is not required only if the court finds the existence of any of the following factors:

* * *

> (4) The father failed without reasonable cause to provide support for the mother during the six months prior to the child's birth

* * *

Statement of the Case.

This case began when respondents petitioned for the adoption of Leanne Marie Wedel, the illegitimate daughter of Laurie Wedel and petitioner Robert Tudor (Tudor), an enrolled member of the Chickasaw Tribe.

Shortly after the petition was filed, Tudor moved for custody of Leanne. He alleged that he was her natural father, that he had not consented to the adoption and that he had been prevented from asserting his rights as a parent by Laurie Wedel. A hearing was held on the petition and motion in January 1984. In a post-hearing brief, petitioner challenged Kan.Stat.Ann. §59-2105(c)(4) on Constitutional grounds. On March 23, 1984, the District Court of Butler County, Kansas denied Tudor's motion and

granted respondents' adoption petition.

In doing so, the District Court explicitly refused to find that petitioner was unfit to be a parent. App. at 3a. The sole ground for the District Court's decision was §59-2105 (c)(4). That statute permits illegitimate children to be relinquished without the consent of the natural father where he "failed without reasonable cause to provide support for the mother during the six months prior to the child's birth". Id.

On appeal, petitioner again raised Due Process and Equal Protection challenges to §59-2105(c)(4). See Petitioner's Brief to the Court of Appeals at 7-13. Petitioner also argued that the protective provisions of the Indian Child Welfare Act, 25 U.S.C. §§1901-1963,

were applicable because his daughter was eligible for membership in the Chickasaw Tribe. Id. at 14. The Court of Appeals summarily affirmed the District Court. App. at 12a. Petitioner then requested that the Kansas Supreme Court review the lower court decisions again raising the Constitutional challenges. See Petitioner's Petition for Review to the Kansas Supreme Court. The State Supreme Court denied the petition for review of June 28, 1985. App. at 13a.

Reasons for Granting the Writ

Under the District Court's decision, as affirmed by the Kansas Court of Appeals and Supreme Court, petitioners' parental rights have been terminated by operation of state law. Although in clear contravention of a federal statute, the Indian Child Welfare Act, as well as the Due Process and Equal Protection clauses of the United States Constitution, that termination will stand unless reviewed and reversed by this Court.

1. The Indian Child Welfare Act, 25 U.S.C. §§1901-1963, was enacted to provide "federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes." 25 U.S.C. §1902. A child is Indian for purposes

of the Act if she is a member of an Indian tribe or she is eligible for membership in an Indian tribe. 25 U.S.C. §1903(4). The Act applies to the biological parents of an Indian child whether wed or unwed. 25 U.S.C. §1903(9). Under the Act, the rights of such parents can only be adversely affected in accordance with the provisions of the Act.

In involuntary proceedings in State court, parental rights cannot be terminated unless it is shown "by evidence beyond a reasonable doubt, including the testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." 25 U.S.C. §1912(f). Further, even in voluntary proceedings, parental consent to termin-

ation of parental rights must be executed in writing before a judge. 25 U.S.C. §1913(a). And, that consent or the consent to adoptive placement of an Indian child can be withdrawn "for any reason at any time" before entry of a final decree of termination or adoption. 25 U.S.C. §1913(c).

The statute relied upon by the District Court, K.S.A. §59-2105(c)(4), is the antithesis of the above provisions. Pursuant to that statute, the District Court granted the adoption of petitioner's daughter and, in effect, terminated his parental rights, see K.S.A. §59-2103(b), without his consent and without a showing that the termination and adoption were necessary to protect the child. Indeed, the District Court specifically refused to find that

petitioner was unfit as a parent. App. at 3a. The action of the District Court was therefore clearly in contravention of the Indian Child Welfare Act.

The protective provisions of the Indian Child Welfare Act must be interpreted as ousting state courts of jurisdiction to act other than in accordance with the Act. Only in that way will the purpose of the Act be furthered. Thus, going as it does to the Kansas court's jurisdiction, petitioner's challenges based on 25 U.S.C. §§1912 and 1913 could not be waived and are properly before this Court. Indeed, Congress has confirmed that interpretation of the Act in §1914.

> Any Indian child who is the subject of any action for . . . termination of parental rights under State law, any parent . . . may petition any court of competent jurisdiction to

> invalidate such action upon a showing that such action violated any provision of sections 1911, 1912, and 1913 of this title.

2. The State's ability to affect petitioner's parental rights is also constrained by the Due Process and Equal Protection clauses of the United States Constitution. Petitioner has an interest in "freedom of personal choice in matters of . . . family life" that is protected by the Due Process Clause of the Fourteenth Amendment. See Quilloin v. Walcott, 434 U.S. 246, 255 (1978). In addition, the Equal Protection Clause prohibits the State of Kansas from treating petitioner differently from other parents except in pursuance of legitimate governmental objectives. See Lehr v. Robertson, 463 U.S. 248, 265 (1983).

Petitioner's daughter was born on

September 26, 1983. The natural mother consented to her adoption on September 27, 1983. Respondents filed an adoption petition on October 18, 1983. One month later, petitioner moved for custody of his daughter asserting that he did not consent to her adoption. Under Kansas law, adoption requires the consent of the mother of an illegitimate child and of the father but as to father only "if required by the court pursuant to K.S.A. 59-2105". Kan.Stat.Ann. §59-2102 (a)(2), (3) (1982). Under §59-2105(c)(4), adoption without the consent of the father is allowed if he failed to provide support for the mother in the six months prior to the child's birth. It was solely on the basis of that statute that the District Court granted respondent's petition over peitioner's objection.

App. at 9a-11a.

a. Petitioner's right to raise his children is "essential". Stanley v. Illinois, 405 U.S. 645, 651 (1972). Kansas may not terminate that right on the basis of a presumption of unfitness such as that in §59-2105(c)(4). Id. at 656-659. That statute "forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities." Id. at 657. The State cannot presume unfitness or, as here, ignore a father's fitness, see App. at 3a, "solely because it is more convenient to presume than to prove", id. at 658, or even "for the sole reason that to do so was thought to be in the [child's] best interest." Smith v. Organization of Foster Families, 431 U.S. 816, 862-863 (1977) (Stewart,

J. concurring in judgment). [1/]

b. In Kansas, the consent of an illegitimate father to the adoption of his children is not required where he did not support the mother in the six months before birth of their child. K.S.A. §59-2105(c)(4). Illegitimate mothers and legitimate parents are not divested of their right to consent under the same circumstances. See K.S.A. §59-2102. Thus, illegitimate fathers are treated differently from illegitimate mothers on the basis of sex and from

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1/ The results in Quilloin, supra, and Lehr, supra, are readily distinguishable because unlike the situations in those cases, petitioner here has demonstrated a full commitment to the responsibilities of parenthood by "coming forward to participate in the rearing of his child" by seeking custody soon after she was born. See Lehr, supra, 463 U.S. at 261; Quilloin, supra, 434 U.S. at 257.

legitimate fathers apparently because of a husband-wife relationship.

The gender-based distinction inherent in the operation of §§59-2102 and 59-2105(c)(4) cannot stand because it does not bear a substantial relationship to any important state interest. The distinction is not required by any "universal difference between maternal and paternal relations at every phase of a child's development," Caban v. Mohammed, 441 U.S. 380, 389 (1979). Nor can it bear a substantial relationship to a State interest in "promoting the adoption of illegitimate children." Id. at 393. Likewise, the distinction between illegitimate and legitimate fathers violates the Equal Protection Clause where, as here, the illegitimate father expresses from the outset a sincere and

determined interest in rearing his child. 2/ Stanley, supra, 405 U.S. at 658. The effect of the Kansas classification is clearly a constitutionally invalid discrimination against unwed fathers. Caban, supra, 441 U.S. at 394.

2/ For the same reason, the decisions in Quilloin, supra, and Lehr, supra, are distinguishable. See note 1 above.

Conclusion

The petition for writ of certiorari should be granted. 3/

Robert Tudor, Pro Se
c/o 1712 N St., N.W.
Washington, D.C. 20036
(202) 785-4166

September 1985

3/ If granted, petitioner would request that this Court reverse the State court decisions and remand for proceedings in accordance with the Indian Child Welfare Act. Petitioner respectfully suggests that that could have the result of curing the Constitutional problems raised by the Kansas statutes. As shown above, there can be no automatic termination of parental rights under the Indian Child Welfare Act. And, under that Act all parents are treated the same .

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APPENDIX A--Decision of the District Court of Butler County, Kansas Dated March 23, 1984

83-A-57

IN THE DISTRICT COURT OF
BUTLER COUNTY, KANSAS

In the Matter of the Adoption of

Leanne Marie Wedel, a Minor Child

MEMORANDUM OPINION

Statement of Case

This is a petition to adopt Leanne Marie Wedel, an illegitimate child born September 26, 1983, brought by Jeffrey Lee Glaesman and his wife, Esther Marie. The petition was filed on October 18, 1983, along with a consent to adopt signed by the natural mother, Laurie Denise Wedel, dated September 27, 1983. On November 22, 1983, Robert Tudor filed

a motion for custody alleging that he was the natural father of the child, that he had not consented to the adoption and that he had been prevented from exercising his parental rights by the actions of the natural mother. The Court has emphasized the dates because they show how this unfortunate case has developed.

The cause was tried to the Court on January 4, 1984, Robert Tudor acknowledges, belatedly, that he is the natural father of the child. By his own testimony he did not acknowledge in his own mind that he was the father of the child until approximately three weeks after her birth and then only after he had been able to count the days from the date of birth to the approximate date of conception and satisfy himself that Laurie was living with him at the time.

At all other times he has publicly denied that he was the father of the child. His mother testified that he privately acknowledged to her that he was the father of Laurie's baby in July, 1983. Mr. Tudor also admits that he has not provided support for six months proceeding the birth, although he alleges that it was with just cause.

Petitioners also allege that he is unfit to be a parent and that he abandoned the mother after having knowledge of her pregnancy. No evidence has been presented to support these contentions and the Court has disregarded them.

Issue

The sole issue before the Court is whether Robert Tudor failed without reasonable cause to provide support for the mother during the six months prior

to the child's birth.

Findings of Fact

Laurie Wedel first met Robert Tudor when they were both students at Baptist Bible College in Springfield, Missouri, which she attended for one semester in the fall of 1981. At the end of that semester she left Baptist Bible College but she stayed on in Springfield, seeing Robert until March, 1982, when she returned to her home town of Garden City, Kansas. In April or May of 1982, Robert persuaded Laurie to come to Houston, Texas, and live with him and his mother. Laurie did so and remained in Houston until the fall of 1982, when Robert returned to Baptist Bible College and she moved back to Garden City. In October of 1982, Laurie and a girlfriend attended a football game at Baptist

Bible College and met Robert there. Afterwards, Robert followed them back to Garden City and once again persuaded Laurie to come back to Houston and live with his mother. Laurie returned to Houston and, except for a visit to Garden City during the Christmas and New Year's holidays, remained there until approximately the first week of March, 1983.

In February, 1983, Laurie became worried because she had missed her period for the second month in a row and talked to Robert about it. Robert thought she might be pregnant and suggested a pregnancy test at the Woman's Outpatient Clinic. The test was performed and the results were positive for pregnancy. The situation was difficult for Robert because he didn't want to accept the

fact of Laurie's pregnancy or acknowledge any responsibility for it. Although the parties disagree over who brought it up, one of the first things discussed was abortion. Also discussed was a suggestion by Robert that Laurie go home to have the child, put it up for adoption and then come back and live with him. Another idea was that she go to an unwed mothers home.

It is apparent to the Court from the testimony of both Robert and Laurie that while Robert wanted Laurie to remain with him, he didn't want to accept the child. Apparently the situation led to steady deterioration in the relationship with increasingly bitter arguments and fights. During one such argument, Robert was taking Laurie and her bags to the bus station. He became so upset he

dropped her in the middle of downtown Houston. Later he returned, picked her up and took her home again. Laurie refused to stay with him, but stayed with a girlfriend that night. She also called her brothers to come and get her. The next day, Robert tried to apologize but the situation could not be resolved and Laurie left for home.

In July, 1982, Laurie went to a pay phone in Garden City and called Robert, he then called her back. At trial Laurie testified that she didn't want to call from anyone's house because she hadn't told her parents about the baby before July and didn't want anyone to know what she was doing, not because she wanted Robert to pay for the call. She also stated that the reason she called was because she was desperate and needed

support. She had not been to see a doctor yet and had no money to pay for doctor fees or medical care. Robert denied paternity saying that he didn't know whether it was his or not. He did offer to see that she receive medical care, is she came to Houston. Laurie claims he didn't offer any money himself but to put her in a hospital where they would pay all the expenses provided the baby was released to them. He also stated she could live with his relatives and he would come to see her. Laurie refused these offers.

On July 26, Robert's birthday, Laurie called him again and the conversation was much the same. Robert said he didn't know if the baby was his or not, it might belong to his best friend. He also offered medical care only if

Laurie came to Houston and refused to say whether he would consent to an adoption. Laurie refused to go to Houston.

On August 31, .aurie Wedel saw a doctor for the first time. On September 26, her baby was born. The next day she signed a consent to adopt. It was not until November 14, 1983, when Robert Tudor appeared at the Glaesman home, asking to see his daughter did anyone know that he was now acknowledging paternity.

Conclusion of Law

1. Robert Tudor apparently believes that Laurie Wedel's act of leaving Houston against his wishes and her failure to return to him so that he could provide medical assistance under his own terms and conditions is suffi-

cient cause to relieve him of the responsibility of providing support to her during the last six months of her pregnancy.

The Court is not impressed with this argument. It is clear to the Court that one of the principle reasons for Laurie Wedel's departure from Houston and refusal to return was Robert Tudor's steadfast refusal to acknowledge paternity. It is also clear that he didn't offer any money himself but only to put her in the hands of third parties who would see to her needs. Laurie Wedel may well have been justified if she had suspected that Robert's offers of medical assistance were simply a lure to bring her back to him without his having to accept any responsibility for the child and his failure to send any assistance to Garden

City, simply a means of increasing the pressure.

Whatever the reasons, the Court finds that Robert Tudor has failed, without reasonable cause, to provide support to Laurie Wedel, the natural mother of the child, within six months prior to the birth of said child and his consent to the adoption of such child is not required.

2. That Laurie Denise Wedel has consented to the adoption of Leanne Marie Wedel and filed her written consent herein.

3. That both Robert Tudor and Laurie Denise Wedel have acknowledged that they are the natural parents of Leanne Marie Wedel.

4. That petitioners are fit and

proper persons to adopt Leanne Marie Wedel.

IT IS THEREFORE BY THE COURT ORDERED that Jeffrey Lee Glaesman and Esther Marie Glaesman be permitted to adopt Leanne Marie Wedel and that her name shall be changed to Leanne Marie Glaesman. The Court Further Orders that no further journal entry is required and that this opinion shall be effective as a journal entry upon filing.

JOHN M. JAWORSKY
Associate District Judge

Filed: March 23, 1984

APPENDIX B--Decision of the Court of Appeals of the State of Kansas, Dated April 4, 1985

NOT DESIGNATED FOR PUBLICATION

No. 56,888

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

IN THE MATTER OF THE ADOPTION OF L.M.W.

MEMORANDUM OPINION

Appeal from Butler District Court; JOHN M. JAWORSKY, judge. Opinion filed April 4, 1985. Affirmed.

Pamela S. Fahey, of Horton, for the appellant.

F. Greg Mathias, of El Dorado, for the appellee.

Before FOTH, C.J., SWINEHART, J., and FREDERICK WOLESLAGEL, District Judge Retired, Assigned.

PER CURIAM: Affirmed under Rule 7.042 (b) and (d) (232 Kan. cxvii).

APPENDIX C--Decision of the Supreme Court of the State of Kansas, Dated June 28, 1985

84-56888-A

IN THE SUPREME COURT OF THE STATE OF KANSAS

In the Matter of the Adoption of LEANNE MARIE WEDEL, a Minor Child.

v.

You are hereby notified of the following action taken in the above entitled case:

PETITION FOR REVIEW.

DENIED.

Yours very truly,

LEWIS C. CARTER
Clerk, Supreme Court

Date June 28, 1985